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Supreme Court of the United States

OCTOBER TERM, 1954

No. 48

LOUIS SHOMBERG, PETITIONER

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 48

LOUIS SHOMBERG, PETITIONER

vs.

UNITED STATES OF AMERICA

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INDEX

		Original	Print
Proceedings in U.S.C.A. for the Second Circuit		1	1
Statement under Rule 15 (6)	(omitted in printing)		
Record from U.S.D.C. for the Southern District of New York		3	1
Order to show cause		3	1
Affidavit of Max Schultz		5	2
Affidavit of Max Blau		10	5
Opinion, Dimock, J.		14	8
Notice of appeal	(omitted in printing)	22	
Stipulation as to record	(omitted in printing)	23	
Clerk's certificate	(omitted in printing)	24	
Opinion, Clark, J.		25	14
Concurring opinion, Frank, J.		30	19
Judgment		32	21
Clerk's certificate	(omitted in printing)	36	
Order granting certiorari		34	23

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[fols. 1-3]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Petition No. 617157

ORDER TO SHOW CAUSE—July 28, 1953

Upon the annexed affidavit of MAX SCHULTZ, duly verified the 28th day of July, 1953; upon the petition filed herein on December 22, 1952; and upon all the proceedings heretofore had herein, Let the District Director of the Immigration and Naturalization Service show cause before this Honorable Court at a stated term thereof for naturalization proceedings, to be held at Room 506, U. S. Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 30th day of July, 1953 at 10:00 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made directing:

(1) That the petition filed herein on December 22, 1952 be brought on for final hearing forthwith or as soon as the Court may direct; and

(2) That the deportation proceedings against the petitioner commenced by the District Director of the Immigration and Naturalization Service pursuant to a Warrant of Arrest issued by him under date of June 22nd, 1953 and now pending before a Special Inquiry Officer under the jurisdiction of and assigned by said District Director, be stayed pending final hearing upon and adjudication of the petition for naturalization filed herein; and

[fol. 4] (3) Such other and further relief as to the Court may seem just and proper.

And pending the hearing and determination of this application and the entry of an appropriate order hereon, Let the deportation proceedings against the petitioner commenced and pending as aforesaid be stayed and they hereby are stayed.

Sufficient cause appearing, Let service of a copy of this order together with a copy of the annexed affidavit on the District Director of the Immigration and Naturalization Service at his office, No. 70 Columbus Avenue, New York,

New York, on or before the 29th day of July, 1953 at 4 P. M. in the afternoon be deemed sufficient.

Dated, New York, N. Y., July 28th, 1953.

E. J. Dimock, United States District Judge.

[fol. 5] In United States District Court

Affidavit of Max Schultz in Support of Motion

State of New York,
City of New York,
County of New York, ss:

Max Schultz, being duly sworn, deposes and says:

1. That he is the attorney for the petitioner above named.

2. That the petitioner did heretofore, on or about October 1, 1952 submit a preliminary application to file a petition for naturalization to the Immigration and Naturalization Service, No. 70 Columbus Avenue, New York, New York.

3. That thereafter petitioner was notified to appear with his witnesses for preliminary examination, and he did appear with his witnesses for such preliminary examination, and such preliminary examination was completed on or about December 22nd, 1952.

4. That following the completion of such preliminary examination, on December 22, 1952, petitioner filed his petition, for naturalization, #617157, in the United States District Court for the Southern District of New York under [fol. 6] the provisions of Sec. 310(a) of the Nationality Act of 1940, as amended (54 Stat. 1144-1145).

5. That on information and belief one, Joseph J. Gaudino, an official of the Immigration and Naturalization Service and subject to the jurisdiction of the District Director was named as "designated examiner" pursuant to applicable law and regulations.

6. That on information and belief complete outside investigations of petitioner's character and qualifications were ordered and made and have been and are completed.

7. That despite the requirements of applicable regula-

tions that the "designated examiner shall, *as soon as practicable after the conclusion of the preliminary examination*, prepare an appropriate recommendation for the court" and notify the petitioner or his attorney thereof,[1] neither petitioner nor his attorney has ever received such notification.

8. That on June 23rd, 1953 petitioner was taken into custody by officers of the Immigration and Naturalization Service pursuant to a Warrant of Arrest issued by the District Director under date of June 22nd, 1953 for the purpose of deporting petitioner and removing him from the United States.

9. That the reasons given for petitioner's deportation in said Warrant of Arrest were not reasons for deportation authorized by any law in effect at the time petitioner's petition for naturalization was filed.

[fol. 7] 10. That on June 24th, 1953 a hearing was conducted on petitioner's deportation before one, Samuel Dorfman, who on information and belief is a Special Inquiry Officer of the Immigration and Naturalization Service and subject to the jurisdiction of the District Director.

11. That said Special Inquiry Officer has not as of this date issued an order for petitioner's deportation.

12. That at the time petitioner was taken into custody he was held without bail but thereafter, on June 24, 1953, petitioner was released from custody pursuant to a bond.

13. That deponent is informed and believes that the District Director of the Immigration and Naturalization Service, through his agents and employees and those officers and officials of the Immigration and Naturalization Service under his jurisdiction, and particularly the designated examiner and the Special Inquiry Officer above named, have no intention of proceeding to final hearing on petitioner's petition for naturalization, but on the contrary intend to deport petitioner from the United States and thereby preclude any further proceedings pursuant to petitioner's petition for naturalization and thus make of his petition a nullity.

[1] Ch. I, Title 8, C. F. R. Sec. 335.12 335.13, 17 Fed. Reg. 11551.

14. Deponent believes that the District Director of the Immigration and Naturalization Service and his agents and employees and those officials and officers of the Immigration and Naturalization Service under his jurisdiction have misconstrued and misinterpreted Section 318 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, 66 Stat. 163) as authorizing such action.

[fol. 8] 15. Deponent submits that other sections of the Immigration and Nationality Act of 1952, and particularly Section 405 thereof, indicate that the District Director's view of Section 318 is clearly erroneous, and accordingly deponent submits that the District Director and his agents and employees and those officials and officers of the Immigration and Naturalization Service under his jurisdiction are proceeding without lawful authority and in actuality contrary to all applicable law.

16. That "exclusive jurisdiction to naturalize persons as citizens of the United States" is conferred, *inter alia*, upon the District Courts of the United States[2] and that neither the District Director of the Immigration and Naturalization Service nor any of his agents or employees nor any officers or officials of the Service, nor the Commissioner, Deputy Commissioner, or Assistant Commissioners, nor the Attorney General, has the power to adjudicate or determine or decide whether petitioner's petition for naturalization should or should not be granted; but on the contrary, only this Court has that power.

17. That the Special Inquiry Officer, before whom the proceedings for petitioner's deportation are now pending, may issue an order for the deportation of petitioner at any time, and that pursuant to such order of deportation petitioner may be immediately removed from the United States and as a consequence thereof petitioner's right to an adjudication on his petition for naturalization and this Court's exclusive judisdiction thereover may be forever defeated.

[fol. 9] 18. Wherefore deponent respectfully requests the annexed order to show cause why an order should not be made directing that the petition herein be brought on for

[2] See 310(a), Immigration and Nationality Act of 1952, formerly Sec. 301(a), Nationality Act of 1940, as amended.

final hearing before the District Court at a stated term for naturalization at the time therein set forth, and that the deportation proceedings against petitioner be stayed pending final hearing and adjudication of petitioner's petition for naturalization; and for a stay of the deportation proceedings against petitioner until such time as the issues raised by the annexed order to show cause are heard and determined.

19. That no previous application for the annexed order to show cause has heretofore been made to this Court or any judge thereof.

Max Schultz.

(Sworn to July 28, 1953.)

[fol. 10] In United States District Court

Affidavit of Max Blau in Opposition to Motion

State of New York,
County of New York,
Southern District of New York, ss:

Max Blau, being duly sworn, deposes and says:

I am an attorney in the Office of the District Counsel, Immigration & Naturalization Service, United States Department of Justice, and am familiar with the facts hereinafter set forth which are disclosed by the relevant files and records of the Immigration & Naturalization Service.

This affidavit is made in opposition to an application by Louis Shomberg, alias Henry Goldberg, for an order directing the District Director of Immigration & Naturalization at New York to calendar his naturalization petition for final hearing, and staying deportation proceedings pending adjudication of said petition.

Petitioner herein filed a naturalization petition in this Court on December 22, 1952 which, after a preliminary examination, was continued for investigation. During the course of the investigation information was received to the effect that petitioner is and was a notorious racketeer and gangster, with an extensive criminal record including two

convictions for crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

[fol. 11] As petitioner's convictions aforesaid render him deportable under the provisions of Clause (4) of Section 241(a) of the Immigration and Nationality Act of 1952, an immigration warrant of arrest was duly issued on June 22, 1953, charging him with being in the United States in violation of law, and subject to deportation on the charge that after entry into the United States he was convicted of two crimes involving moral turpitude, to wit, the crimes of grand larceny, second degree, and manslaughter in the first degree. Petitioner was apprehended under said warrant of arrest and thereafter released under $10,000 bond.

On June 24, 1953 a deportation hearing was duly conducted before a Special Inquiry Officer as provided by statute [8 U. S. C. § 1252(b)]. No decision has as yet been rendered therein because petitioner's counsel requested and was given until August 3, 1953 to submit evidence and a brief in support of his application to terminate the proceedings.

Since deportation proceedings are now pending against this petitioner pursuant to a warrant of arrest issued under the Immigration and Nationality Act of 1952, a final hearing on his naturalization petition is prohibited. The relevant statute, Section 318 of the Immigration and Nationality Act of 1952 (8 U. S. C. § 1429), provides in pertinent part as follows:

> "Notwithstanding the provisions of section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there [fol. 12] is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act; * * *"

The above quoted statutory provisions are substantially similar to the language contained in the earlier Act (Section 27, Internal Security Act of 1950; Public Law 831,

81st Cong.). The predecessor statute was construed by the Court of Appeals for the Second Circuit as a complete bar to naturalization. *United States ex rel. Jankowski v. Shaughnessy*, 186 F. 2nd 580 (1951), affirming 93 F. Supp. 7. In that case the Court of Appeals said:

> "Appellant contends that this provision does not apply to a naturalization petition pending at the time when the new Act became effective. For the reasons stated by the judge below, we see no merit in that contention."

In view of the statutory interdict against a final hearing of his naturalization petition, the instant motion to compel such a hearing should be denied. Similarly, petitioner's application for a stay of deportation proceedings should be denied, as it is clear from the statute that Congress intended, with exceptions not here applicable, that no deportable alien should be naturalized. Moreover, even if the Court had power to naturalize an alien while deportation proceedings are pending against him, this does not constitute sufficient reason for restraining the Attorney General or his subordinate from carrying out the statutory mandate to determine the question of deportability. See *Klig v. Watkins*, D. C. N. Y. 1948, 84 F. Supp. 486.

It might be added that, in any event, the investigation [fol. 13] in the naturalization case has not been completed and considerable time must elapse before the designated examiner will be in a position to make the required findings of fact, conclusions of law and recommendation to the naturalization court. In making that recommendation, the designated examiner and the Court in deciding whether petitioner has established the statutory prerequisites for naturalization could and should consider the findings and determination in the deportation proceeding.

Wherefore, it is respectfully prayed that petitioner's motion be denied in all respects, and that the temporary stay contained in the order to show cause, dated July 28, 1953, be vacated and set aside.

Max Blau.

Sworn to August 4, 1953.

[fol. 14] IN THE UNITED STATES DISTRICT COURT

OPINION—August 21, 1953

Appearances:

Max Schultz, Esq., Attorney for Petitioner, 261 Broadway, New York 7, N. Y. Alan Y. Cole Esq., Washington, D. C., Of Counsel.

Louis Steinberg, Esq., District Counsel, U. S. Department of Justice, Immigration & Naturalization Service. Max Blau, Esq., Attorney, U. S. Department of Justice, Immigration & Naturalization Service.

DIMOCK, D. J.:

Petitioner in this naturalization proceeding filed his petition on December 22, 1952. At that time there was in force [fol. 15] section 329(c) of the Nationality Act of 1940, as added by section 27 of the Internal Security Act of 1950, 8 U. S. C. § 729 (c), which prohibited naturalization where there was outstanding a final finding of deportability and prohibited final hearing in naturalization if a deportation proceeding was pending. Petitioner was not, however, liable to deportation at that time and was therefore, so far as this provision for priority of deportation proceedings was concerned, eligible for naturalization. Two days later, nevertheless, on December 24, 1952, the Immigration and Nationality Act of 1952 went into effect and by its section 241(a)(4), created as a new ground for deportation the commission at any time of two felonies involving moral turpitude. Petitioner had committed two such felonies, one in 1913 and one in 1915. Pursuant to that section deportation proceedings were begun against him on June 23, 1953, and they are now pending undetermined.

Petitioner, in spite of the provision for priority of deportation proceedings, makes this motion for an order that his petition for naturalization filed on December 22, 1952 be brought on for final hearing forthwith and that the deportation proceeding be stayed pending determination of the naturalization proceeding.

The provision for priority of deportation proceedings grew out of the fact that there were cases where an alien

subject to deportation was nevertheless eligible for naturalization. This led to a race between the Attorney General and the alien, the Attorney General seeking to deport the alien and the alien seeking to obtain naturalization. See United States v. Waskowski, 7 Cir., 1947, 158 F. 2d 962; United States v. District Director of Imm. & Nat., 2 Cir., 1949, 175 F. 2d 693; Petition of Kavadias, 7 Cir., 1949, 177 F. [fol. 16] 2d 497. Congress in 1950 gave the clear track to the Attorney General by adopting the priority section providing against naturalization after issuance of a warrant of deportation and staying naturalization proceedings pending deportation proceedings. See United States v. Shaughnessy, 2 Cir., 1951, 186 F. 2d 580, 582. Since the adoption of the priority provision it is within the power of the Attorney General, by the institution or withholding of deportation proceedings against an alien who is subject to deportation either to stay his naturalization proceedings and deport him or to let him proceed to the safe refuge of a certificate of naturalization.

The provision for priority of deportation proceedings was continued in section 318 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1429, which, so far as important here, reads as follows:

> "Sec. 318. * * * Notwithstanding the provisions of section 405(b), * * * no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act."

Petitioner's ground for moving for a hearing of his naturalization petition despite the institution of deportation proceedings is a savings provision in the Immigration and Nationality Act of 1952 § 405, 8 U. S. C. A. § 1101 footnote, which, so far as important here, reads as follows:

> [fol. 17] "Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall

be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order for warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

Petitioner takes the position that the new provision in the Act, section 241(a)(4), making the conviction of two felonies involving moral turpitude at any time a ground for deportation, by its terms permits a deportation proceeding against him to go to a final finding of deportability and thus, if section 318, the priority section, is given literal effect, prevents his naturalization and consequently "affect[fol. 18] fect[s] the validity of" his "petition for naturalization" and "affects[s]" his "right" to naturalization "in process of acquisition".

Petitioner attempts to harmonize these to him discordant provisions by saying that it is only to proceedings based on warrants of deportation issued on grounds in existence prior to the 1952 Act that the priority afforded by section 318 applies. While that might have been an intelligible legislative scheme, Congress used no words to indicate that that was its intention. To read it into the statute would be judicial legislation.

Petitioner argues as an alternative that the priority

ings but the fact that section 405(b) specifically makes exactly that provision as to naturalization proceedings in- [fols. 21-24] dicates that the general language in section 405(a) does not apply to them. Thus, when section 318 provides for priority of deportation proceedings "notwithstanding the provisions of section 405(b)", it precludes reliance on the preservation of rights under the old law to keep naturalization proceedings from being superseded by deportation proceedings.

Petitioner argues that, if section 318 is permitted to bar a final hearing on his naturalization petition, it has the effect of rendering the savings clauses in section 405 entirely meaningless. That is not true. The savings clauses preserve for pending proceedings all of the old law as to naturalization. It is only the old law as to deportation which is rendered inapplicable by section 318.

Motion denied and stay restraining prosecution of deportation proceedings vacated.

Dated: August 21, 1953.

E. J. Dimock, United States District Judge.

[fol. 25] In the United States Court of Appeals for the Second Circuit, October Term, 1953

No. 134

Argued December 17, 1953

Docket No. 22901

Louis Shomberg, Petitioner-Appellant,

v.

United States of America, Appellee

Before Clark, Frank and Hincks, Circuit Judges

Opinion—January 25, 1954

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge

Louis Shomberg appeals from an order, D. C. S. D. N. Y., 115 F. Supp. 336, denying his motion for a direction by the court that his petition for naturalization be brought on for final hearing and for stay of pending deportation proceedings against him until decision of his petition. Affirmed.

[fol. 26] Alan Y. Cole, Washington, D. C. (Max Schultz, New York City, on the brief), for petitioner-appellant.

Harold J. Raby, Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., New York City, and Max Blau and Lester Friedman, Attys., Immigration and Naturalization Service, on the brief) for appellee.

Clark, Circuit Judge:

This appeal is taken from a denial of petitioner-appellant's motion to have his pending petition for naturalization brought on for final hearing before he is deported, and to have the deportation proceedings against him stayed until adjudication of his petition.

Petitioner filed his petition for naturalization on December 22, 1952. At that time, as at present, in so far as it appears, he was eligible for citizenship. Nor was he then liable for deportation. Two days later, on December 24,

1952, the Immigration and Nationality Act of 1952—enacted on June 27, 1952—went into effect. It created as a new ground for deportation the commission at any time of two felonies involving moral turpitude. § 241(a)(4), 241(d), 8 U. S. C. § 1251(a)(4), 1251(d). Since petitioner had committed two such felonies, one in 1913 and one in 1915, he then became and is now liable for deportation, though this in terms does not affect his eligibility for citizenship. § 405(a, b), 8 U. S. C. § 101 footnote, quoted below. On June 22, 1953, while his naturalization petition was still pending, deportation proceedings were instituted against him, based on the ground stated. He made his present motion in the district court on July 28, 1953, and now appeals from [fol. 27] its denial by Judge Dimock in a reasoned opinion reported in D. C. S. N. Y. 115 F. Supp. 336.

Initially the government seeks dismissal of this order as not appealable, arguing that it does not come within the provisions of 28 U. S. C. § 1292(1) allowing appeal from the refusal of an injunction. But since here a stay is sought of proceedings pending elsewhere than in the current action, we think the order comes within the distinction often adverted to between the enjoining of other legal proceedings and a mere regulation of procedure within the action itself. See, e. g., *International Nickel Co.* v. *Martin J. Barry, Inc.*, 4 Cir., 204 F. 2d 583, 585; *Beckhardt* v. *National Power & Light Co.*, 2 Cir., 164 F. 2d 199; *Cover* v. *Schwartz*, 2 Cir., 112 F. 2d 566. Hence the order is appealable. The supporting objections advanced by the government, such as that petitioner's application does not comply with the requirements for the issuance of temporary injunctions stated in F. R. 65, might suggest ground of error had the application been granted, but hardly touch the question of appealability.

Turning therefore to the merits we find that the Act of 1952 contains saving clauses, § 405, 8 U. S. C. § 1101 footnote, as follows:

> "Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest,

order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, [fol. 28] civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

"(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

It also has a priority provision, § 318, 8 U. S. C. § 1429:

"Sec. 318. * * * Notwithstanding the provisions of section 405(b) of this Act, and except as provided in sections 1438 and 1439 of this title no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act * * *"

Our problem is to find an harmonious interrelation of these provisions.

Petitioner argues that § 318 was intended to apply only to cases where naturalization proceedings were instituted subsequent to the effective date of the Act, and that its predecessor, § 329(c) of the Nationality Act of 1940, which makes substantially the same provision, can apply only to [fol. 29] deportation proceedings under that Act. He thus

finds an interstice covering the narrow category of cases where naturalization was commenced under the old law and deportation is attempted under the new. To support his position he points out that when Congress added the proviso, "Notwithstanding the provisions of section 405(b)" in drafting § 318, it added the semicolon which separates the "final finding of deportability" from the pending deportation proceedings provisions of the section. From this he argues that the matter following the semicolon is not subject to the "Notwithstanding" clause and not removed from the impact of § 405(b). This close reading of the statute might be justified if there were any indications in the general scheme of the provisions or in legislative history to lend support. But in the absence thereof, we are not constrained to grant such substantive effect to so minor and ambiguous a punctuational variation.

Next it is urged that since the "Notwithstanding" clause makes reference only to § 405(b), it necessarily leaves § 405(a) in effect; that § 405(a) decrees that "Nothing contained in this Act * * * shall be construed * * * to affect any * * * right in process of acquisition * * *"; that petitioner's naturalization is a "right in process of acquisition"; and that to allow deportation proceedings, not possible except under this Act, to suspend his right to a final hearing is to construe the Act to "affect" a "right in process of acquisition." At first blush this argument is persuasive, for naturalization has been held to be a "right," once the statutory qualifications have been met. *Tutun v. United States*, 270 U. S. 568, 578. But on closer inspection it is clear that the proffered reading is at the expense of several other provisions of the Act.

In the first place, to read § 405(a) so broadly as to remove petitioner's case from § 318 is to give it scope which makes § 405(b) entirely redundant. For if a petition for natu- [fol. 30] ralization, once filed, confers a "right in process of acquisition" which may not in any way be "affected" by the Act, it must necessarily follow that the petition "shall be heard and determined in accordance with the requirements of law in effect when such petition was filed." Of course it is conceivable that Congress intended to sacrifice brevity to clarity and inserted § 405(b) to make doubly clear

what was already the law under § 405(a). But in this view the phrase "Notwithstanding the provisions of section 405(b)" must refer only to the clarifying subsection, and thus have no significance—a result which seems unlikely.

As noted above, the prior law contained a provision for priority of deportation proceedings which must be deemed a part of "the requirements of law in effect when [the instant] petition was filed." And there can be no doubt that § 318 provides the same priority in respect to proceedings commenced under the new act. If there were nothing more, petitioner's argument of an hiatus would be rather persuasive. But § 318 makes specific reference to § 405(b), which by its terms applies only to cases within the alleged hiatus. The conclusion is inescapable that the urged construction does violence to the Act.

Furthermore, the "Notwithstanding" clause is not confined to § 318. It appears in several other provisions, *e. g.*, § 313(a), 8 U. S. C. § 1424(a); § 315(a), 8 U. S. C. § 1426(a); § 331(d), 8 U. S. C. § 1442(d), and each time raises the same problem. A single example will suffice. Section 331(d) provides for the termination of enemy alien status and goes on to declare that: "Notwithstanding the provisions of section 405(b) of this Act, this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this chapter and which is still pending on that date." Under the urged construction the filing of a petition would confer a "right in process of acquisition" which, notwithstanding the patent [fol. 31] effort of Congress to extend the benefits of this section, could not under § 405(a) be "affected" thereby. Such interpretation is ridiculous.

The phrase "right in process of acquisition" appears in a context which if taken alone is obviously broad and quite embracing. It is not now before us for definition of its full sweep; but it would seem that petitions may be saved from various technical and procedural changes, and presumably rights "in process of acquisition" other than those stemming from a naturalization petition will be discovered. Compare generally *Petition of Menasche*, D. C. P. R., 115 F. Supp. [illegible]. Be that as it may, in holding that its general terms must be read with the specific provisions of § 405(b)

and do not override § 318 we are not denying its effect in the manner that a contrary construction would nullify other portions of the statute.

It is suggested that in thus concluding we are reading the instant case out of § 405(a) by implication in contravention of the section's mandate that it apply "unless otherwise *specifically* provided." (Emphasis supplied.) On the contrary, we have followed merely the time-honored precept of reading a statute as a whole. Nor is it significant that the draftsman of § 330(b), 8 U. S. C. § 1441(b), in providing a limited saving clause, expressly leaves § 318 intact. The draftsman there was faced with a narrow problem, and the impact of all related sections was immediately foreseeable.

If the conclusion thus made inevitable appears harsh, the decision and responsibility is that of Congress, which has disclosed its general and over-all intent in unmistakable terms. It has made the new ground of deportability of 8 U. S. C. § 1251(d), *supra*, clearly applicable to aliens entering or facts occurring prior to June 27, 1952; and its retroactivity has been recognized and upheld. *U. S. ex rel. Nukk* v. *District Director of Immigration & Naturalization*, [fol. 32] 2 Cir., 205 F. 2d 242 and cases cited 243, note 1. To allow the anomaly of an apparent try for citizenship by such deportable persons who had the foresight or the accident of seeking citizenship during the brief period between enactment and effective date of the new Act is to make mercy strange and fortuitous indeed. The interpretation here stated has at least the virtue of promoting consistency of treatment of the aliens.

Order affirmed.

FRANK, Circuit Judge (concurring):

My colleagues say that the conclusion they reach is "inescapable," and that any other interpretation of the statute "is ridiculous." My doubts are too strong to allow me to join in such strong language. These doubts do not stem from petitioner's attempt at a thoroughgoing semicolonization of § 318; for punctuation should play a small

role in statutory construction.[1] My doubts are provoked by the following:

Section 318 specifically mentions § 405(b) as the sole part of § 405 which is to be inoperative when it clashes with § 318. This reference to clause (b) discloses a selective purpose, *i. e.*, not to refer to § 405(a). Moreover, § 405(a) by its express terms provides, "Nothing contained in this Act, *unless otherwise specifically provided therein*, shall be construed * * * to affect any * * * right in process of acquisition * * *; but as to all such * * * rights * * * the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein*, hereby contained in force and effect * * * *."*[1a] It would seem, then, that to apply § 318 to "rights in process of acquisition" is exactly [fol. 33] what both § 318 and 405 (a) deliberately said we must not do, since such an application not only (1) disregards the explicit and selective reference in § 318 to § 405 (b) but also (2), reading § 318 into § 405 (a) by mere implication, disregards the words in § 405 (a) "unless specifically provided therein." It is noteworthy, too, that the phrase "rights in process of acquisition" in § 405 (a) is new; it was not in the savings clause of the 1949 Act; it thus appears that Congress intended to broaden this savings provision. *See Petition of Menasche*, 115 Fed. Supp. 434, 436.[2] And § 330 (b),[3] a limited savings clause, con-

[1] Cf. Johnson, J., in *United States* v. *Palmer*, 3 Wheat. 610, 636, that men's lives should not "depend upon a comma."

[1a] Emphasis added.

[2] That naturalization is a "right," see *Tutun* v. *United States*, 270 U. S. 568, 578.

[3] It reads as follows: "Any person who was excepted from certain requirements of the naturalization laws under section 325 of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and had filed a petition for naturalization under section 325 of the Nationality Act of 1940, may, if such petition was pending on September 23, 1950, and is still pending on the effective date of this

tains striking evidence that, when Congress meant to have § 318 apply retroactively—*i.e.*, to naturalization petitions pending at the time the 1952 Act became effective—Congress plainly said so and did not rely upon mere implication.

Despite these doubts, I concur, but with much hesitation. I concur only because I think the well-known dominant purpose of the chief sponsors of the Act was to ensure the deportation of persons like petitioner.

[fols. 34-35] In the United States Court of Appeals for the Second Circuit

Louis Shomberg, Petitioner-Appellant,

v.

United States, Respondent-Appellee

Judgment—Filed January 25th, 1954

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now hereby ordered, adjudged,

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such petition was filed: Provided, That any such person shall be subject to the provisions of section 313 and to those provisions of section 318 which relate to the prohibition against the naturalization of a person against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act, or which relate to the prohibition against the final hearing on a petition for naturalization if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act."

and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 48

LOUIS SHOMBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.